(18,200.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 347.

ALPHONSE EMSHEIMER, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1901.

1 UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1900, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

ALPHONSE EMSHEIMER
v.
CITY OF NEW ORLEANS.

Be it remembered that heretofore, to wit, on the 14th day of July, 1900, a transcript of the record of the above-styled cause from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, and said cause coming on to be heard at the present November term, 1900, was argued by counsel, whereupon it was ordered that the following questions and propositions of law arising on the record, be certified to the Supreme Court of the United States, to wit:

2 U. S. Circuit Court of Appeals. Filed May 28, 1901. J. M. McKee, Clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

ALPHONSE EMSHEIMER, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee. } No. 971.

Appeal from the United States circuit court, eastern district of Louisiana.

This suit was commenced by filing in the circuit court the following:

"*Bill and Exhibit.*

Filed November 13th, 1899.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division:

Alphonse Emsheimer of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against The City of New Orleans, a municipal corporation created by the laws of Louisiana, and a citizen of said State. And thereupon your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74), approved September 14th, 1868, the parishes of Orleans, Jefferson and St. Bernard were territorially united in one district for the purpose of police government therein, called the 'Metropolitan police district of New Orleans, State of Louisiana;' that the government of said district for police purposes was vested in a board of commissioners, styled 'the board of Metropolitan police.'

2nd. That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries (which *was* prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make annually an estimate of the expenses of maintaining a
3 police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay, and to provide the means for promptly paying, the amounts thus apportioned to them.

3rd. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police and apportioned the same to said several cities and parishes as required by said acts.

4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of $6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards by acts of said legislature, said cities were consolidated with said city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were complainant is unable to state,

but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority levied and collected taxes for the purpose of paying the same, and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand, one hundred and six and $\frac{54}{100}$ dollars ($241,106.54), and the defendant, the present City of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

4 8th. And your orator avers that said City of New Orleans was and is a statutory trustee of the money derived from such taxation, and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been, and still is making collections thereof, and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans with the consent of said city, to whom said city on July 25th, 1888, paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars ($30,944.94) part and parcel of the moneys derived from the collection of such taxes as well as other small sums thereafter, the amount and date of payment of which is to your orator unknown.

And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then, and is now without any successor or representative, and its affairs are under no administration whatsoever; that said City of New Orleans has since the death of said receiver continued to collect said police taxes, and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments; and that she holds the same subject to said trust as above averred.

And your orator avers that large amounts of said police taxes levied, as aforesaid, became delinquent, and thereafter interest accrued thereon at the rate of ten per cent. per annum; that said City of New Orleans collected large amounts of such interest, which as accessory to said taxes should have been paid to said police board, but which she neglected and refused in violation of her duty as

trustee, to apply to the payment of said apportionments, and she should be required to account for the same with interest thereon; that the amount of police taxes as well as the interest thereon, so as aforesaid collected, is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court, or otherwise, as your honors may direct.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and maintained the same until March 31st, 1877, when said act No. 74 of September 14th, 1868, establishing said Metropolitan police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished without any provision being made for the liquidation of its affairs, or the payment of its debts.

10. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law, ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complaint herein, and he is remediless, except in this honorable court, where matters of this nature are cognizable and relievable wherefore he brings this his bill in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expense of this suit.

11th. That one Lew Goldstein, as holder of a large amount of Metropolitan Police warrants, issued to officers and members of the Metropolitan police, and assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said City of New Orleans, said City of Kenner and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver and enforcemeut of the liabilities of said several defendants, for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, he claims now held by your orator being among those so presened and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the City of New Orleans was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof; but as to all other defendants the same still remains pending and undisposed of.

That afterwards, to wit: February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said City of New Orleans and others for an account of the sums due by said defendants, applicable to the payment of the cer-

tificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin has acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said interveners, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpœna in said case was duly served upon said City of New Orleans February 9th, 1891, that she afterwards appeared and answered and a final decree was made against her in favor of said complainant, and the interveners therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

12th. That your orator is the holder and owner of certificates issued by said board of Metropolitan police in acknowledgement of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said police board, amounting to three thousand, thirty and forty-eight/100 dollars ($3,030.48), a list whereof is hereto annexed as Exhibit "A," and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

And your orator avers that each of said persons in whose favor said claims accrued, and to whom said certificates were issued, or their heirs or legal representatives, are citizens respectively of States other than Louisiana and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness, represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows viz:

6 Said D. M. Moore is a citizen of the State of New York.
" Eli Jones is a citizen of the State of Texas.
" Peter Joseph is a citizen of the State of Colorado.
" Robert Crofton is a citizen of the State of Mississippi.
" W. C. Bodechtel is a citizen of the State of California.
" J. H. Moore is a citizen of the State of Colorado.
" Edward Masterson is a citizen of the State of Ohio.
" John Dinan is a citizen of the State of Ohio.
" F. Coleman is a citizen of the State of Ohio.
" R. H. Taylor is a citizen of the State of Illinois.
" W. H. Murphy is a citizen of the State of Michigan.

Said G. H. Hamersley resided in and was a citizen of the State of California, until he died recently, leaving two sons, G. H. Hammersley and —— Hammersley, as his sole heirs, who are also citizens of the State of California.

Said Dr. J. B. Cooper resided in and was also a citizen of the State of California, where he died leaving Mrs. Catherine E. Cooper, his widow in community, as sole heir under the laws of said State of which she is a citizen.

15th. And your orator further shows and avers that there are now outstanding, due and unpaid, other warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief, that including interest thereof, the amount exceeds two hundred thousand dollars ($200,000.00); that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by the said City of New Orleans, and by other municipal corporations within said police district; that the amount due by said city as aforesaid, is applicable to the payment of the claims held and owned by your orator as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city, in order that the amount due by her may be ascertained and fixed and decreed to be paid, and applied to the payment of your orator's claims, and of such others as shall join herein and contribute to the expense of this suit.

In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law to the end therefor- that the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true and perfect answer make to all and singular the premises (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court, of the amount of taxes collected by the defendant on account of the assessments and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver, the amount of said taxes collected, with interest thereon, since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds, to meet the demands of the complainant and other creditors similarly situated who may come into this cause and take the benefit of these proceedings, and all expenses and costs; and that the same be applied to their payment.

7 May it please your honors to grant unto your orator a writ of subpœna directed to said City of New Orleans, therein and thereby commanding her on a day to be named and under a certain penalty therein specified, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further, and general relief as the nature of the circumstances of the case may require, and as to equity and good conscience may be agreeable. And your orator will ever pray, etc.

(Signed) J. D. ROUSE,
Solicitor for Complainant.

(Signed) WM. GRANT,
Of Counsel.

EXHIBIT 'A,' Annexed to Bill of Alphonse Emsheimer.

List of Certificates of Indebtedness of Board of Metropolitan Police and Claims Against it Held and Owned by said Complainant.

Original payee.	Time.	Amount.
J. M. Moore	Nov., '74	71.23
Do.	Dec., '75	65.75
Do.	Dec., '76	35.51
Eli Jones	Nov., '74	76.72
Do.	Dec., '76	84.69
E. Jones	Dec., '74	30.13
Do.	Dec., '75	82.19
Do.	Nov., '76	59.00
Peter Joseph	Dec., '74	152.87
Do.	Dec., '75	152.87
Robert Crofton	Oct., '74	118.90
Do.	Nov., '74	115.06
Do.	Dec., '74	118.90
Do.	Dec., '75	118.90
Do.	Dec., '76	118.57
Do.	Nov., '76	82.62
W. C. Bodechtel	Nov., '74	69.31
Do.	Dec., '74	70.95
Do.	Dec., '75	69.31
J. H. Moore	Dec., '76	127.04
Edward Masterson	Nov., '74	82.19
Do.	Dec., '76	84.69
R. H. Taylor	Nov., '74	68.50
Do.	Dec., '75	71.23
John Dinan	Dec., '75	84.93
Do.	Dec., '75	84.93
G. H. Hammersley	Nov., '74	84.38
Do.	Dec., '74	90.41
W. H. Murphy	Nov., '74	51.23
Do.	Nov., '74	30.13
Do.	Dec., '74	93.42
Do.	———	66.12
F. Coleman	Nov., '74	76.71
Do.	Dec., '74	71.23
Dr. J. B. Cooper	Dec., '75	169.86
		3,030.48"

8 Thereafter counsel for The City of New Orleans entered an appearance and filed the following demurrer:

"United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830. In Equity.

The Demurrer of The City of New Orleans to the Bill of Complaint of Alphonse Emsheimer, the Above-named Plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

First. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the want of proper, sufficient and necessary averment of the citizenship of complainant's assignor or assignors of the warrants, certificates, claims or choses in action, upon which this suit is brought; nor does it sufficiently appear from the averments of complainant's said bill, who were or are the assignors of the said warrants, certificates, claims or choses in action. That by the averments of complainant's said bill, it is disclosed that this court is without jurisdiction of this suit by reason particularly of its failure to show with sufficient clearness, or to show at all, the citizenship, at the date this suit was instituted, of the parties from whom complainant acquired the said warrants, certificates, claims or choses in action.

Second. That it appears by the said complainant's said bill that the parish of Jefferson and the parish of St. Bernard are necessary parties to said bill, inasmuch as it is herein stated that by certain acts of the General Assembly of the State of Louisiana, the annual estimate of expenses for maintaining a police force in the Metropolitan police district were to be apportioned by the board of Metropolitan police to the City of New Orleans and the said two parishes, who were required by said statutes to provide the means for promptly paying the amounts thus apportioned to them; and inasmuch further, that it is therein stated that there were made by the said parishes, levies for taxes, to pay and discharge their said respective apportionments; that the said parishes and this defendant, have mutually and reciprocally a common interest herein, which the said bill affects.

Third. That said complainant has not, in and by said bill, made and stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Fourth. That said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed for, that the said bill presents no matter of equity, nor do its averments, or any of them, disclose any subject within the equity jurisdiction of this court; that if, in point of law and fact, or either, complainant be entitled to any

relief against this defendant, there is a plain, adequate and complete remedy at law, by which the same may be obtained.

9 Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed, with costs and charges, in this behalf most wrongfully sustained.

(Signed) W. B. SOMMERVILLE,
(Signed) BRANCH K. MILLER,
Solicitors for Defendant."

On hearing the circuit court entered the following:

"ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

This cause came on to be heard at a former day upon the demurrer to the bill, filed by defendant, and after arguments from counsel, was submitted.

On consideration thereof for the reasons on file:

It is ordered that the defendant's first ground of demurrer be and the same is hereby overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees and of the City of New Orleans, *is* fully sufficient.

It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law."

The complainant below prosecuted an appeal to this court and assigns herein errors as follows:

"1st. Said circuit court erred in sustaining the demurrer to the complainant's bill, and in dismissing the same.

2nd. Said court erred in holding that complainant's bill does not state a case within the jurisdiction of a court of equity.

Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed and said cause reinstated to be proceeded with according to law."

10 And now at this term, this cause came on to be heard on the transcript and was argued,—

Whereupon, for the proper decision of the case, this court, desiring the instruction of the honorable, the Supreme Court of the United States, certifies to that court the following questions and propositions of law arising on the record, to wit:

1.

This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship?

2.

Under the facts stated in the bill and under the proper construction of act No. 35 of the Laws of Louisiana, approved March 31, 1877, can the City of New Orleans, as a legal successor of the defunct Metropolitan police board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late board of Metropolitan police for the amounts due on said certificates?

3.

Under the facts stated in the bill, can the complainant maintain a suit in equity in the circuit court of the United States for the eastern district of Louisiana against the City of New Orleans for the establishment of a fund out of which he in common with other creditors of the late Metropolitan police board may be paid *pro rata* upon their claims?

11 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 10 pages numbered from 1 to 10 inclusive, contain a true, full and perfect transcript of the statement, questions and propositions of law certified to the supreme court in the case of Alphonse Emsheimer appellant, *vs.* City of New Orleans appellee, as fully and completely as the same now remains of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said circuit court of appeals at the city of New Orleans on this 5th day of June, A. D. 1901.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Endorsed on cover: File No. 18,200. U. S. C. C. of appeals, 5th circuit. Term No. 347. Alphonse Emsheimer, appellant, *vs.* The City of New Orleans. Filed June 12th, 1901.

Office Supreme Court U.S.
FILED
JAN 2 1902
JAMES H. McKENNEY,
Clerk.

No. 347.

Motion to advance.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 2, 1902.

No. 347.

ALPHONSE EMSHEIMER,
APPELLANT,

versus

THE CITY OF NEW ORLEANS,
APPELLEE.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION TO ADVANCE THE CAUSE FOR HEARING.

This suit was brought November 15, 1899, by a creditor of the Board of Metropolitan Police of New Orleans, which corporation was abolished in 1877, without any provision being made for its liquidation or the payment of its debts. The bill is brought by the complainant in his own behalf, as well as in behalf of other creditors of said Board, to compel payment by the City of large sums due by it, and the application thereof *prorata* to the payment of the complainant and other creditors of said Board.

The bill was demurred to, for want of equity, and the jurisdiction of the Circuit Court was denied.

The demurrer to the jurisdiction was overruled, and for want of equity it was sustained, and the bill dismissed. The City of New Orleans appealed to this Court, and its appeal was dismissed. *New Orleans vs. Emsheimer,* 181 U. S. R. 153.

The complainant appealed to the United States Circuit Court of Appeals, but pending the appeal of the defendant to this Court, said Court of Appeals declined to hear the complainant's appeal. After the appeal to this Court was dismissed, the Court of Appeals heard the case, and made the certificate here now pending. Under the circumstances recited, and because of the long delay to which the complainant has been subjected, he moves that this cause be advanced upon the docket and assigned for an early hearing.

Respectfully submitted,

J. D. ROUSE,

WM. GRANT,

Solicitors.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 347.

ALPHONSE EMSHEIMER,
APPELLANT,

versus

THE CITY OF NEW ORLEANS,
APPELLEE.

On a Certificate from United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT.

The complainant is an alien, the defendant, a municipal corporation, is a citizen of Louisiana. (R. p. 1.) The complainant sues upon obligations of the Metropolitan Board of Police, of which he is assignee. The payees of such obligations were, when the bill was filed, severally citizens of other States than Louisiana; the citizenship of each assignor being stated in the bill. (R. p. 5.)

The defendant demurred to the bill, assigning grounds of demurrer, in substance as follows:

1st. That the bill does not show the citizenship of the parties from whom the complainant acquired the obligations sued upon;

2d. That necessary parties were not made parties to the bill;

3d. That the bill does not state a cause entitling complainant to the relief prayed; and,

4th. That the bill disclosed no case within the equitable jurisdiction of the Court. (R. p. 8.)

The first ground of demurrer was overruled by the Court; the second ground was ignored, and the third and fourth grounds were sustained; the bill was dismissed "for want of equity" (R. p. 9), and the complainant appealed to the Circuit Court of Appeals.

That Court, after argument and submission, certified the following questions to this Court for determination under the provision of the sixth section of the Act of March 3d, 1891, viz.:

1. This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the Court jurisdiction on the ground of diverse citizenship?

2. Under the facts stated in the bill, and under the proper construction of Act No. 35 of the Laws of Louisiana approved March 31st, 1877, can the City of New Orleans, as a legal successor of the defunct Metropolitan Police Board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness of the late Board of Metropolitan Police for the amounts due on said certificates?

3. Under the facts stated in the bill, can the complainant maintain a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana against the City of New Orleans for the establishment of a fund

out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid *pro rata* upon their claims? (R. p. 9, 10.)

The questions arise out of the pleadings in the case, which are also certified (R. p. 1, *et seq.*), and to which reference is now here made.

ARGUMENT.

I.

The first question must be answered in the affirmative. As already stated, the bill is brought by an alien against a municipal corporation created under the laws of Louisiana. The diverse citizenship therefore cannot be denied. But the complainant sues as assignee of choses in action, and the bill avers that each of his assignors was *at the time the bill was filed*, a citizen of some State other than Louisiana, the particular citizenship of each of them being set out and alleged.

The demurrer denies the jurisdiction of the Court because the bill does not show that the *payees* of the claims were citizens of other States than Louisiana, *when the assignment thereof was made*; as well as when the suit was brought.

It has so often been held that the right of an assignee of a chose in action to sue thereon in the United States Circuit Court, himself having the requisite citizenship to sue therein, depends upon the capacity of the assignor to sue therein at the time the suit is brought, that it ought no longer to admit of discussion.

Kirkman vs. Hamilton et al., 6 Peters, 20.
Parker vs. Ormsby, 141 U. S. 81.
White vs. Leahy, 3 Dill., 378.
Portage City Water Co. vs. City of Portage, 102 Fed. R. 769.
Chamberlain vs. Eckert, 2 Biss, 126.
Baxter vs. Hatch, 6 McLean, 68.
Mollan vs. Torrance, 9 Wheat., 537.
Jones et al. vs. Shapera, 57 F. R. 457.

In view of these authorities the counsel for respondent frankly admitted at the hearing in the Circuit Court, that such is the law.

The demurrer also denies the jurisdiction of the Circuit Court because the citizenship of the *immediate assignor* of the complainant is not alleged.

The bill shows that complainant is assignee *of the payees* of the obligations sued on. The judiciary act of 1888 excludes jurisdiction of the Circuit Court where the action is by an assignee of a chose in action, "unless said suit might have been prosecuted in such Court * * * if no assignment or transfer had been made."

The jurisdiction of the Circuit Court in a suit by an assignee of a chose in action, otherwise qualified to sue therein, depends upon the citizenship of the original assignor, the payee of the obligation, at the time the suit is brought. *If he could then sue* in the Circuit Court, *if he had not assigned his right,* his assignee may maintain such suit.

All the authorities sustain this common-sense view of the Statute.

In *White vs. Leahy*, 3 Dillon, 378, when the note was made and endorsed by the payee he was a citizen of the same State with the maker. When the suit was brought the payee was a citizen of another State. The Court said:

> "*If no assignment* of such note had been made, the assignor might, being at the time when suit was brought, a citizen of Texas, have commenced it: and under the statute his assignee has the same right. If the restriction of the assignor does not exist at the time the suit commenced, the Court has jurisdiction if the case involves the requisite amount, and is between a citizen of the State where the suit is brought and a citizen of another State."

That the jurisdiction depends upon the requisite citizen-

ship of the payee or original assignor, has hardly been questioned in nearly half a century. Mr. Justice Grier, in 1852, in the case of *Milledollar vs. Bell*, 2 Wall, Jr. 334, passing upon this question, said:

> "The Statute does not take from the assignee of a chose in action, his right to sue in the Courts of the United States, unless his immediate assignor could have sustained such action; but only in case the Court could have had no jurisdiction between the original parties to the instrument, if no assignment had been made. The situation or rights of the temporary immediate assignees, holders, or indorsers, enter not into the conditions of the case."

He also approved *Wilson vs. Fisher's Executors*, 1 Baldwin, 133, to the same effect. In the case at bar, the claims sued on were assigned or transferred in blank, there being no indorsers intermediate to the complainant. He, as holder of the claims sued on, can, if he sees fit, write over the endorsement a direct transfer to himself. *Evans vs. Gee*, 11 Peters, 80.

In *Mollan vs. Torrance*, 9 Wheaton, 537, it was held that the indorser of a promissory note could not sue a remote indorser thereof in the Circuit Court, without averring that his immediate indorser could have brought suit in such Court against his indorser, if he had not indorsed it to the plaintiff; the reason for the decision being that the right of action in the indorsee against the indorser, was upon the contract of indorsement, and therefore the assignee by indorsement who sued to recover upon the contract of a remote indorser, must show that his immediate indorser, whose title was derived solely through the assignment of the paper by indorsement to him, could have sued thereon in the Circuit Court.

In this case there is no question of indorsement, none being averred.

The Circuit Court followed the above cited cases and held that the first ground of demurrer was not well taken.

II.

Disregarding their order, we will now deal with the third question, and take up the second one thereafter.

The defendant's demurrer denies the right of the complainant to proceed in equity upon the facts averred in the bill; and as we understand it, the third question is whether or not

THE CASE IS ONE OF EQUITABLE COGNIZANCE.

The bill avers that the Board of Metropolitan Police was a body corporate, whose existence was terminated by act of the Legislature March 31st, 1877, without any provision being made for its liquidation or the payment of its debts, that it was largely indebted to complainant and others, and that the defendant, the City of New Orleans, was largely indebted to it.

The dissolution of the Metropolitan Board, by legislative act, without providing for the payment of its debts or appointing a representative, took from the creditors the action they had against their debtor for the satisfaction of their claims. The effect of such act was to pronounce the legal death of the debtor without appointing an administrator who can be sued. It abated all pending actions and rendered it impossible to bring a new suit against the debtor.

Mumma vs. Potomac Co., 8 Pet. 281.

The only remedy left to the creditors is to establish a trust against such assets as the corporation had at the date of the dissolution, and seek payment out of them. (*Broughton vs. Pensacola*, 93 U. S. 266.)

The destruction of a corporation by the repeal of its charter does not destroy its rights of property or its choses

in action. No suit can thereafter be maintained against it, but the rights of its creditors are not annihilated, "and the courts may, if the Legislature does not provide some special remedy, enforce such rights by means within their power."

Greenwood vs. Freight Co., 105 U. S. 13.
Mumma vs. Potomac Co., 10 Pet. 281.
Sturges vs. Vanderbilt, 73 N. Y. 384.

"The ancient doctrine, that upon the repeal of a private corporation its debts were extinguished and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity so far as to subject for their satisfaction any property possessed by the corporation at the time. In view of equity its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders, and if a municipal corporation, upon the surrender, or extinction in other ways, of its charter is possessed of any property a court of equity will equally take possession of it for the benefit of the creditors of the corporation."

Broughton vs. Pensacola, 93 U. S. 266.
Merriweather vs. Garrett, 102 U. S. 512.

The charter of a municipal government can not be so dissolved as to impair the obligation of a contract, or preclude the creditor from recovering his debt. 1 Dill. Municipal Cor., Sec. 114.

The destruction of the Board of Police by the repealing act deprived its creditors of their action at law against

it for the enforcement of their demands, and left them without remedy except in a court of equity, which in the language of the decisions above quoted "will lay hold of its property and administer it" for their benefit. Judgment at law and fruitless execution is not required, because impossible, in the absence of an existing debtor.

"If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

Russell vs. Clark's Exrs., 7 Cranch. 69.
Innes vs. Lansing, 7 Paige's Chy. 583.
Case vs. Beauregard, 101, U. S. 688.
3d Pomeroy's Eq. 464, note 4.

And it has been held by this court that by the French jurisprudence prevailing in Louisiana, a creditor may exercise the right of action of his debtor, and that "the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States, and all existing rights in any State of the Union ought to be suable in some form in those courts." *New Orleans vs. Gaines*, 131 U. S. 191-213.

This equitable right is disclosed by the bill. The averments are: That the defendant is liable to the Police Board for balances due upon its apportionments for police expenses; that said board had no other assets at the time of its dissolution applicable to the payment of complainant; that the liabilities of said board should be fixed and determined and paid out of said assets.

The facts show the impossibility of determining the *pro rata* liability of the defendant to the Board of Police, in an action at law, as well also the impossibility of the liability to any particular creditor of the Police Board, being de-

termined in an action at law, against the City of New Orleans in a suit for the recovery of the amount due him; and that therefore the complainant can have no relief except in a court of equity.

The same question was presented to this Court in *Benjamin vs. New Orleans,* 153 U. S. 411, which was also a suit to enforce, under the same conditions of fact and law, the payment of obligations of the same Board of Police: It was dismissed for want of jurisdiction in the Circuit Court, but not for want of equity, and you then said:

> "The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed could not be enforced at law, or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation." (p. 428.)
>
> *Broughton vs. Pensacola,* 93 U. S. 266, 268.
>
> *Merriweather vs. Garrett,* 102 U. S. 472, 527.

You also said (p. 435):

> "The board being abolished, recovery of a judgment was dispensed with, but the establishment of the claims was still required as the basis for further relief, and that involved nothing more than recovery over, or a direct decree within the principles of *New Orleans vs. Gaines' Admr.,* 131 U. S. 131, analogous to judgment on garnishee process."

In that case it was held that under the jurisprudence prevailing in Louisiana, a creditor might exercise the right of action of his debtor, a right analogous to the garnishee or trustee process in some States, and that this right could be enforced in a Federal Court *by a suit in equity* on the principle of subrogation."

These, and other passages in the opinion of the Court, show conclusively that you regarded the Benjamin case as being properly brought in equity, but denied the jurisdic-

tion of the Circuit Court, only, because the pleadings failed to show a suit, which could have been maintained by Benjamin's assignors, if no assignment had been made.

But other grounds of equitable jurisdiction are shown in the present bill not found in the Benjamin case. Complainant avers that the defendant as trustee has collected large sums of money derived from taxes levied for the purpose of paying its indebtedness to the Board of Police, which it has failed to pay over, but in violation of its duty, as such trustee, still holds and which it ought to be required to account for.

This is a distinct ground of equitable jurisdiction, and was maintained by the Circuit Court of Appeals in *Fisher vs. New Orleans,* 91 Fed. R. 574-582.

That Court there said: "We consider this bill as a creditor's bill to reach equities existing between the school board of the City of New Orleans and the City of New Orleans, in which an accounting between the two parties is necessary, in order to ascertain the indebtedness of the city to the City School Board. No such relief can be obtained at law."

That case was removed to this Court by writ of *certiorari,* where the judgment of the Court of Appeals was affirmed, excepting so far as interest was concerned, as to which it was modified. *New Orleans vs. Fisher,* 180 U. S. 185.

In that case it appeared that the City of New Orleans had collected a large amount of school taxes, with interest and penalties thereon, and failed to account for the same; and it was held that creditors of the School Board, whose claims were payable out of those taxes, were entitled, *if the School Board failed to require it,* to file a creditor's bill against the city for an accounting.

This Court there said:

"The bill invoked the ordinary exercise of equity juris-

diction in this class of cases. The school taxes collected were held in trust by the city, and, as the School Board declined to require an accounting, these creditors, whose claims were payable out of the taxes were entitled to the interposition of a court of equity to reach the fund."

In the case at bar, there being no Board of Police existing, to require such accounting, it follows *ex necessitati rei*, that the creditors of said board may do so.

The case is clearly one of equitable cognizance, and the third question should be answered in the affirmative.

III.

The second question seems to involve the merits of the complainant's case. "Under the facts stated in the bill" which must, under the demurrer, be taken as admitted, it appears that complainant is a creditor of the Police Board, that it has been abolished, without any provision having been made, for its liquidation or the payment of its debts; and that the City of New Orleans is indebted to said board in a sum sufficient to pay and discharge its liabilites to complainant and all others. The inquiry whether or not the city can be held liable to the complainant "as a legal successor of the defunct Metropolitan Police Board" was undoubtedly prompted by what was said by this Court in *New Orleans vs. Benjamin supra* as to the effect of the repealing act of 1877, as follows:

"The act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its

debts if existing laws were ample to effect that purpose. In that view the City of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the board. Although the creditors could not avail themselves of the instrumentality of the board to sue for the apportionments, (if that could ever have been done,) still, as those apportionments had all been made and taxes had been levied and were in course of collection to pay them, or so much thereof as was needed to pay the warrants and certificates, the act of 1877 left the City of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been." (153 U. S. 429.)

The Court overlooked the fact that not only was the charter of the Board of Police repealed by the act of 1877, but every other act in relation thereto, as well; and that the board under its charter had jurisdiction over parishes and cities other than New Orleans, in territorial extent many times as great as that city. Why should New Orleans be considered as the successor of the board? The act does not so provide. Why not the City of Kenner, or the Parish of Jefferson, or the Parish of St. Bernard?

But if the Court will hold to its opinion that the City of New Orleans is a successor of the defunct board, and as such liable for its debts, still it can not defeat the complainant's bill, because, no adequate remedy at law is open to him for the recovery of the amount due.

We still adhere to our original contention: that when the apportionments of police expenses to the corporations in the district, made by the board became final, they were absolute obligations of such corporations, which they were bound to discharge by payment, and that whatever amounts remain unpaid are assets of the board applicable to the payment of its debts.

The Supreme Court of Louisiana has so decided in *State ex rel. Brittin vs. New Orleans,* 106 La. Rep. 469.

That Court then said:

"In 1868 the Legislature created a Metropolitan Police District, and placed the government and control thereof in a Board known as the Board of Metropolitan Police. Said act and the acts supplementary thereto required said Board to make annually an estimate of the expense of maintaining a police force in said district, and to apportion the same to the several cities and parishes within said district; and required said cities and parishes to provide the means for promptly paying the amounts thus apportioned to them. The City of New Orleans was one of the cities within said district. Under the apportionments made for the years 1869, 1870, 1871, 1872, 1873, 1874, 1875, and 1876, the amount payable by the City of New Orleans was approximately $800,000 per year. The said Board went out of existence in 1877, leaving a large outstanding indebtedness represented by warrants issued to policemen, etc., and large claims against the city for amounts due under the yearly apportionments; which amounts had thus remained unpaid because of the non-collection of the taxes imposed to meet the payments."

A receiver having been appointed in that case, subsequently died, and from May, 1891, until December, 1899, the receivership was vacant.

After the complainant's bill was filed, November 13th, 1899, the City herself applied for the appointment of a receiver to fill the vacancy. The purpose of the City to anticipate the appointment of a receiver by the Circuit Court is apparent. The receiver thus appointed asked that his powers be enlarged so as to enable him to recover all the assets of the defunct board. The City resisted the enlargement of his powers, and the Supreme Court said:

"The City having herself provoked the appointment of this receiver, is not in a position to say that the litigation has terminated and that a receiver is not necessary to wind up the litigation; and since there is no receiver, it is obvi-

ous that he should have all necessary powers to reduce to possession the assets that the receivership may be entitled to claim and receive. The City cannot deny that there are such assets, nor that there are debts of the defunct Board still outstanding, nor that she is liable to an accounting for the taxes in question. Because heretofore an amount has been recovered and distributed, is no reason why all other amounts that may be due should not be in a like manner recovered and distributed. We think, therefore, that the enlarged powers were properly granted."

That the apportionments, when they became final, were absolute obligations imposed upon the city is manifest from the acts of the Legislature in relation thereto.

These acts are printed in the appendix.

By act of the Legislature of Louisiana (No. 74), approved September 14, 1868 (La. Acts 1868, p. 85), the Metropoltan Police District of New Orleans, State of Louisiana, was created, embracing therein the parishes of Orleans, Jefferson and St. Bernard, and the government of said district, for police purposes, was vested in a board of commissioners created by the act called "The Board of Metropolitan Police." The City of New Orleans was within the district.

By Sec. 27 of said act said board was required to make annually an estimate of the expense of maintaining a police force, including their salaries; to apportion said expenses to the several cities and parishes in the Metropolitan District, and to submit said estimate and apportionment to the mayors of said cities, and to the police juries of the parishes, which, in the absence of objections, or if objections were made and overruled, became final and binding upon said corporations.

By Sec. 29 the councils of the several cities and the police juries of the parishes were empowered and "directed annually to order and *cause* to be raised *and collected*, by the tax upon the estates, real and personal, sub-

ject to taxation according to law * * * the sums of money as aforesaid annually estimated and apportioned as the share of such cities and parishes of the said total expenses of the Metropolitan Police District."

These provisions were repeated in Act 92 of 1869, Secs. 25 and 27.

Under these provisions of law a metropolitan police was established in 1868 in the City of New Orleans and adjoining municipalities, and continued until abolished on the 31st of March, 1877, by the repeal of the law creating it, and all laws amendatory thereof.

Said Police Board annually made the estimate and apportionment of its expenses, and notified the mayors of the municipalities and the police juries within the district thereof as required by the act.

Act No. 94, of March 30, 1870 (Acts, E. S. p. 213,) declared that the councils of the cities, and the police juries of the parishes in the Police District "shall *promptly pay* and *provide the means for the prompt payment* of the proportion of expenses applicable to the said cities," etc., according to the estimate and apportionments made by Board of Commissioners of Metropolitan Police, *and which are now binding upon them.*" This was a confirmation of the apportionments, by legislative sanction, and a mandate was laid upon the municipal and parish legislative bodies, to discharge their obligations. Immediate payment and immediate provision for payment was commanded; the means were left to their discretion. The power of taxation still remained whereby they could be reimbursed.

By Section 2 of the act they were also required to "promptly pay and provide the means for the prompt payment of all such future estimates and apportionments" when they became "binding upon them;" and by Section 4 their treasurers were to pay over to the State Treasurer

all moneys received on account of the sum due and owing to the Metropolitan Police Board within five days after the receipt of the same," under the penalty of fine or imprisonment.

Section 5 of said act further provided that all ordinances, resolutions or other acts passed by the Council of said cities or by said Police Juries, passed after the passage of this act, should be null and void, unless their respective proportions of police expenses were paid or the means provided for the payment of the same, and which proportions were declared to be binding on them.

Act No. 16, of March 24, 1875 (Acts, p. 35), entitled "An act to enforce the payment by the City of New Orleans and the several cities and parishes of the Metropolitan Police District of the apportionment made upon them by the Board of Metropolitan Police," etc., divided the apportionment into twelve equal parts and required one of such parts to be paid in full every month.

If they were in excess of the amount actually required in any one year the surplus would go to reduce the apportionment for the next year.

The whole course of legislation in relation to the Police Board shows a determined and persistent effort to compel the City of New Orleans and other municipal corporations to pay their apportionments regardless of the taxes levied and collected by them for that purpose. While they were authorized to raise the amount by taxation they were commanded in most peremptory terms to *levy and collect enough* taxes to pay their respective apportionments. The bill shows that the City of New Orleans failed to do so, and that she owes a balance of $241,106.54 on that account.

It follows that the city is a debtor of the Police Board for such balance, and it should be applied to the payment of its creditors, including complainant.

If our theory of the obligations of the city in the prem-

ises is not correct, and the city is liable only for the police taxes collected by her and not accounted for, which the bill shows is a large sum, then in accordance with the decision in *New Orleans vs. Fisher, supra,* the bill must be maintained as a bill for an accounting as already shown above in discussing the question of equitable jurisdiction.

The litigation which was provoked by the refusal of the city to pay her indebtedness to the Police Board has now lasted many years, and during the whole time she has sought to avoid it on purely technical grounds, mostly going to the jurisdiction of the court in which the suits were brought. We earnestly hope that your answers to the questions propounded by the Court of Appeals will be such as to settle all contention as to jurisdiction and liability of the city, leaving only the question as to amount due.

Respectfully submitted,

J. D. ROUSE,

WILLIAM GRANT,

Solicitors for Complainant.

APPENDIX.

Acts of the Legislature of Louisiana as far as material, referred to in the brief.

ACT No. 74 OF 1868, SESSION ACTS, PAGE 85.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the Parishes of Orleans, Jefferson and St. Bernard are hereby constituted and territorially united for the purposes of police government and police discipline therein, into one district which shall be known and called "The Metropolitan Police District of New Orleans, State of Louisiana."

SEC. 2. *Be it further enacted, etc.,* That the powers and duties connected with and incident to the police government and discipline of the said district shall be as hereinafter more especially provided for, vested in and exercised by a Board, consisting of five commissioners, one to be a resident of the City of Jefferson, to be styled the Board of Metropolitan Police, and by a Metropolitan Police Force, composed of a Superintendent of Metropolitan Police Force, Surgeons of Metropolitan Police Force, Captains of Metropolitan Police Force, Sergeants of Metropolitan Police Force, Corporals of Metropolitan Police Force, Patrolmen of Metropolitan Police Force, Clerks and Doormen of Metropolitan Police Force.

* * * * * *

SEC. 8. *Be it further enacted, etc.,* That each officer and member of said Metropolitan Police Force shall hold office respectively during good behavior, and shall be liable to removal from office or membership of the said police force only after written charges shall have been preferred against him, according to the rules and regulations of the said Board of Commissioners; but no person shall ever be appointed to office or membership of the said police force who is not a citizen of the United States and of this State, or who ever has been convicted of crime, or

who is disqualified by the fourteenth article of the Constitution of the United States, or by the terms of article ninety-nine of the Constitution of this State.

* * * * * *

SEC. 27. *Be it further enacted, etc.*, That the Board of Commissioners, convened as a Board of estimate and apportionment, shall, on the first Monday after their appointment and annualy thereafter, proceed to make up a financial estimate of the sums required *annually* for expenses in the execution of criminal process, supplying for the fitting up, lighting, cleansing, repairing, furnishing of police offices and stations, lockups, houses of detention, for alterations in, addition to and repairs of same, for office fixtures and accommodation, advertising, printing and stationery, police badges, numbers and clubs, beds and bedding for the police force, and for witnesses and prisoners, for support of witnesses and prisoners, for support of witnesses and prisoners while in the custody of the police, for secret police service, hack and cab hire, and also for all sums necessary for counsel fees, law expenses and disbursements by the Board of Commissioners, or rendered necessary in criminal or civil actions and proceedings against the said commissioners or officers or members of the force for acts done in the discharge of duty or by color of office, and also for the salaries and pay required by this act, and such other general and contingent expenses as may from time to time, in the judgment of such board of estimate and apportionment, become necessary or proper, with the enumeration thereof. Such estimate shall be accompanied with a written apportionment by said Board, of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan District, in ratio of the number of police officers and men authorized by this act and employed by such cities and parishes respectively. The said estimate and apportionment shall be submitted to the Mayors of the cities and Police Juries of the parishes within the said Metropolitan District to consider the same, and if the said Mayors and Police Juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify or cause to be notified the said Board of Commissioners, it shall be the duty of the

latter to carefully revise the same and consider the said objection; but if such Board shall adhere to their original action of estimate and apportionment, or if they shall modify the same, then their action shall be final, and shall be binding upon the respective cities and towns interested therein.

* * * * * *

SEC. 29. *Be it further enacted, etc.,* That the Common Councils of the Cities of New Orleans, Jefferson City and Carrollton, and the Police Juries of the towns of Algiers and Gretna, and of the Parishes of Orleans, Jefferson and St. Bernard are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estates, real and personal, subject to taxation according to law, within the said cities and towns, the sums of money as aforesaid, annually estimated and apportioned as the share of such cities or parishes of the said total expenses of the Metropolitan Police District.

ACT No. 92 OF 1869, SESSION ACTS, PAGE 92.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the act entitled "An Act to establish a Metropolitan Police District and to provide for the government thereof," is hereby amended and re-enacted so as to read as follows:

SEC. 2. *Be it further enacted, etc.,* That the parishes of Orleans, Jefferson and St. Bernard, are hereby constituted and territorially united for the purposes of police government and police discipline therein, into one district, which shall be known and called "The Metropolitan Police District of New Orleans, State of Louisiana."

SEC. 3. *Be it further enacted, etc.,* That the powers and duties connected with and incident to the police government and discipline of the said district, shall be as hereinafter more especially provided for, vested in and exercised by a Board consisting of five commissioners, one to be a resident of the City of Jefferson, to be styled the "Board of Metropolitan Police," and by a Metropolitan Police

Force composed of a Superintendent of Metropolitan Police, Surgeons of Metropolitan Police Force, Captains of Metropolitan Police Force, Sergeants of Metropolitan Police Force, Corporals of Metropolitan Police Force, Patrolmen of Metropolitan Police Force, Clerks and Doormen of Metropolitan Police Force.

* * * * * *

SEC. 25. *Be it further enacted, etc.,* That the Board of Commissioners, convened as a Board of Estimate and Apportionment, shall on the first Monday after their appointment, and annualy thereafter, proceed to make up a financial estimate of the sums required annually for expenses in the execution of criminal process, supplying for the fitting up, lighting, cleansing, repairing, furnishing of police offices and stations, lock-ups, houses of detention, for attendance, in additions to and repairs of same, for office fixtures and accommodations, advertising, printing and stationery, police badges, numbers and clubs, beds and bedding for the police force, and for witnesses and prisoners, for support of witnesses and prisoners while in the custody of the police, for secret police service, hack and cab hire, and also for all sums necessary for counsel fees, law expenses and disbursements of the Board of Commissioners, or rendered necessary in criminal or civil actions and proceedings against the said commissioners or officers or members of the force for acts done in the discharge of duty, or by color of office, and also for the salaries and pay required by this act, and such other general and contingent expenses as may from time to time, in the judgment of such Board of Estimate and Apportionment, become necessary or proper with the enumeration thereof. Such estimate shall be accompanied with a written apportionment by said Board of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan District, in ratio of the number of police officers and men assigned by said Metropolitan Police Board for police duty in said cities or parishes within the Metropolitan Police District. The said estimate and apportionment shall be submitted to the Mayors of the cities, and Police Juries of the parishes within the said Metropolitan District to consider the same, and if the said Mayors or Police

Juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify or cause to be notified the said Board of Commissioners, it shall be the duty of the latter to carefully revise the same and consider the said objections; but if such Board shall adhere to their original action of estimate and apportionment, or if they shall modify the same, then their action shall be final and shall be binding upon the respective cities and parishes within the Metropolitan District interested therein.

* * * * * *

SEC. 27. *Be it further enacted, etc.*, That the Common Councils of the Cities of New Orleans, Jefferson and Carrollton, and the Police Juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and Car-Bernard, are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estate, real and personal, subject to taxation according to law, within said cities and parishes, the sums of money as aforesaid annually estimated and apportioned as the share of such city or parishes of said total expenses of the Metropolitan Police District.

ACT. 33 OF 1874, SESSION ACTS, PAGE 68.

SEC. 2. *Be it further enacted, etc.*, That section twenty-seven of an act of the General Assembly of the State of Louisiana, entitled an act to amend and re-enact an act entitled an act to establish a Metropolitan Police District, and to provide for the government thereof, approved September 14, 1868, approved March 8, 1869, and which reads as follows: "That the common councils of the Cities of New Orleans, Jefferson and Carrollton, and the police juries of the Towns of Algiers and Gretna, and of the Parishes of Orleans, Jefferson and St. Bernard, are hereby respectively empowered and directed annually to order and cause to be raised and collected by tax upon the estate, real and personal, subject to taxation acording to law within the said cities and parishes the sums of money as aforesaid annually estimated and apportioned as the share of such city or parishes of said total expenses of the Metropolitan Police District," be amended and re-enacted to read as fol-

lows: The common councils of the cities of New Orleans and Carrollton, and the town of Kennerville, and the police jury of the parishes of Jefferson and St. Bernard are respectively authorized and required, and hereby directed to levy and collect a special tax upon all property, real and personal, subject by law to taxation, within the cities of New Orleans and Carrollton, the town of Kennerville and the parishes of Jefferson and St. Bernard, as estimated and apportioned by the Board of Metropolitan Police Commissioners for the sums due by each of the said cities, town and parishes composing the said Metropolitan Police District for the support and maintenance of the Metropolitan Police force for the year in which said estimate and apportionment is made and furnished by said Board of Police Commissioners to said cities, town and parishes composing the Metropolitan Police District to the full amount of the estimate and apportionment so made and furnished, and the common councils of the cities of New Orleans and Carrollton, the town of Kennerville and the police juries of the parishes of Jefferson and St. Bernard shall cause the tax for police purposes to be assessed and collected at the same time and in the same manner as provided by law for the collection of other taxes due the said cities, town and parishes and any failure or refusal on the part of the common councils and police juries of the cities, town and parishes composing the said Metropolitan Police District to comply with the provisions of this law or discrimination in collection against this tax and in favor of any other tax or taxes, to the detriment of this tax, shall be cause for removal from office of such parties so offending by the Governor of the State. If any municipal or parish officer within the said Metropolitan Police District shall mingle any portion of the moneys collected on account of the Metropolitan Police tax with any other funds, or shall divert the same from the purposes contemplated by this law, he shall be removed from office by the Governor of the State, and liable to criminal indictment for malfeasance in office.

SEC. 3. *Be it further enacted, etc.*, That the fiscal year of the Board of Metropolitan Police shall begin with the first day of January, and end with the last day of Decem-

ber in each year, and that the Board of Police Commissioners shall make an estimate and apportionment for the expenses of the eMtropolitan Police District for the year commencing January 1, 1874, and thereafter on or before the first day of January of each year, which estimate and apportionment shall be binding upon the cities of New Orleans and Carrollton, and the town of Kennerville, ,and the parishes of Jefferson and St. Bernard, in accordance with the terms of existing laws, and of this act, with regard to the estimates and apportionments of the annual expenses for the support and maintenance of the Metropolitan Police force, authorized to be made by said Board of Police Commissioners.

* * * * * *

Act No 16, of 1875.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the total amount of the apportionment made by the Board of Metropolitan Police for any year, against each and every parish and city belonging to and constituting part of the Metropolitan Police District, shall be divided into twelve equal parts, one for each month of the current year, one of which parts shall be payable and collectible in full on or before the last day of each month as the *pro rata* of such apportionment for that month.

Sec. 2. *Be it further enacted, etc.,* That it is hereby made the duty of the City of New Orleans, and of each and every city and parish constituting and making part of the Metropolitan Police District to pay to the treasurer of the Board of Metropolitan Police on or before the end of every month the full amount of the *pro rata* of the apportionment made against such parish or city for the current year by said board that is payable and collectible for said month, *provided,* that any excess of money over such *pro rata* that may have been collected shall be paid to the said board.

* * * * * *

ACT No 35 E. S., 1877, PAGE 57.

To repeal Act. No. 74, approved September fourteenth, eighteen hundred and sixty-eight; Act No. 44, approved February twenty-seventh, eighteen hundred and sixty-nine; Act No. 87, approved March sixth, eighteen hundred and sixty-nine; Act No. 92, approved March eighth, eighteen hundred and sixty-nine; Act No. 94, approved March thirtieth, eighteen-hundred and seventy; Act No. 37, approved March fifth, eighteen hundred and seventy-three; Act No. 64, approved March twenty-sixth, eighteen hundred and seventy-three; Act No. 33, approved February twenty-sixth, eighteen hundred and seventy-four; Act No. 60, approved March seventeenth, eighteen hundred and seventy-four; Act No. 16, approved March twenty-fourth, eighteen hundred and seventy-five; and to authorize the City of New Orleans to establish, organize and maintain a proper and sufficient police force, to preserve order and good government within the corporate limits of said city, and to assume control of the fire alarm and police telegraph, and to pass ordinances providing for the control, direction and pay of the said police force, and to limit the annual expense of the same, and to establish a Board of Police Commissioners.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That Act No. 74, approved September fourteenth, eighteen hundred and sixty-eight, entitled "An Act to establish a Metropolitan Police District and to provide for the government thereof," Act No. 44, approved February twenty-seventh, eighteen hundred and sixty-nine;; Act No. 87, approved March sixth, eighteen hundred and sixty-nine; Act No. 92, approved March eight, eighteen hundred and sixty-nine, entitled "An Act to amend and re-enact 'an Act to establish a Metropolitan Police District and to provide for the government thereof,'" approved September fourteenth, eighteen hundred and sixty-eight; Act No. 94, approved March thirtieth, eighteen hundred and seventy, entitled "An Act to order the payment

and to provide the means for the payment of the estimate and apportionment of the expenses of the Board of Metropolitan Police, assessed and applicable to the cities, parishes and police juries within the Metropolitan Police Districts, and to more fully define the duties of the State Treasurer;" Act No. 37, approved March fifth, eighteen hundred and seventy-three, entitled "An Act authorizing the muster of the Metropolitan Police force as a part of the militia of the State, authorizing the said force to be increased when on militia duty to three full regiments, to be called the Metropolitan Brigade; authorizing the assignment of other officers and troops to said brigade, and providing for the enlistment, enrollment, pay and command of said Metropolitan Brigade;" Act No. 64, approved March twenty-sixth, eighteen hundred and seventy-three; Act 33, approved February twenty-sixth, eighteen hundred and seventy-four, entitled "An Act to amend and re-enact sections fifteen and twenty-seven of an Act of the General Assembly of the State of Louisiana, entitled an Act to amend and re-enact an Act entitled an Act to establish a Metropolitan Police District, and to provide for the government thereof, approved September fourteenth, eighteen hundred and sixty-eight, approved March eight, eighteen hundred and sixty-nine," and for other purposes; Act No. 60, approved March seventeenth, eighteen hundred and seventy-four, and Act No. 16, approved March twenty-fourth, eighteen hundred and seventy-five, entitled "An Act to enforce the payment by the City of New Orleans and the several cities and parishes of the Metropolitan Police District, of the apportionment made upon them by the Board of Metropolitan Police and for other purposes," be and the same are hereby repealed; the said repeal to take effect from and after the passage of this Act.

SEC. 2. *Be it further enacted, etc.,* That the City of New Orleans be and it is hereby authorized and empowered, through the Mayor and Board of Administrators, to establish, organize and maintain a proper and sufficient police force, to preserve order and good government within the corporate limits of said city, and to assume the management and control of the fire alarm and police telegraph; *provided,* the whole expense of said police force, fire alarm

and police telegraph shall not exceed, and is hereby limited to the sum of three hundred and twenty-five thousand dollars per annum.

SEC. 3. *Be it further enacted, etc.,* That said police force and fire alarm and police telegraph shall be entirely under the control and direction of the Mayor and Board of Administrators of the City of New Orleans, so far as the appointment and organization of the same is concerned, and that the said City Council shall provide therefor, by the passage of suitable ordinances, and shall also provide in said ordinances for the appointment of a Board of Police Commissioners; said board shall consist of four commissioners, in addition to the Mayor of the City of New Orleans, who shall be *ex-officio* a member and president of the board, and the Administrator of Police of said city, who shall be *ex-officio* a member of said board to be chosen in the manner hereinafter prescribed, and a majority of said board shall constitute a quorum for transaction of business. That the Mayor shall nominate and with the advice and consent of the Common Council, appoint the commissioners of said Board of Police; and the said commissioners shal hold office for one, two, three and four years, to be determined by lot; upon their apportionment and at the expiration of the term of each of said commissioners, the Mayor shall appoint as aforesaid, a commissioner, who shall hold office for four years. The power of trying, of removal or of suspension of any of the officers or patrolmen is exclusively vested in said board, and it shall possess such other powers and perform such other duties as may be authorized and enjoined by the city administration.

SEC. 4. *Be it further enacted, etc.,* That all laws, or parts of laws contrary to, or inconsistent with, the provisio of this Act, be and the same are hereby repealed, and this Act shall take effect from and after its passage and promulgation.

ACT NO. 94 OF 1870, SESSION ACTS PAGE 213.

To order the payment and to provide the means for the payment of the estimate and apportionment of the expenses of the Board of Metropolitan Police, assessed

and applicable to the cities, parishes and police juries within the Metropolitan Police District, and to more fully define the duties of the State Treasurer.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the Councils of the cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, shall promptly pay and provide the means for the prompt payment of the proportion of expenses applicable to the said cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, according to the estimate and apportionments made by Board of Commissioners of Metropolitan Police, and which are now binding upon them.

SEC. 2. *Be it further enacted, etc.,* That the said cities, towns, police juries and parishes shall promptly pay and provide means for the payment of all such future estimates and apportionments applicable to them, when such estimates and apportionments shall become binding upon them.

* * * * * *

SEC. 5. *Be it further enacted, etc.,* That all ordinances, resolutions, or other acts passed by said Councils of the City of New Orleans, Jefferson City and Carrollton, and the police juries of the parish of Orleans, right bank, parish of Jefferson, right bank, parish of Jefferson, left bank, and the parish of St. Bernard, passed after the passage of this act, shall be null and void, unless the proportion of expenses applicable to said cities, towns, police juries and parishes within the Metropolitan Police District, and now binding on them, be paid, or means provided for the payment of the same; and for the future, all said ordinances, resolutions and other acts shall be null and void, unless payment is made, or means are provided for the payment of such expenses, from the day they become binding on said cities, towns, police juries and parishes.

SEC. 6. *Be it further enacted, etc.,* That this act shall take effect from and after its passage.

30133

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 347.

ALPHONSE EMSHEIMER

versus

CITY OF NEW ORLEANS.

On a Certificate, from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT AND APPELLEE.

This suit is one brought on a bill of complaint alleging the same to be a cause within the equity jurisdiction of the United States Courts. It is founded upon certain warrants for the payment of money, claimed to have been issued by the Board of Metropolitan Police by the act of the General Assembly of the State of Louisiana, No. 74, of the session of the year 1868; the present bill, except in so far as it attempts to show Federal jurisdiction based upon the diverse citizenship of the parties, is identically the same as that brought upon the same class of warrants

which was passed upon by this Court in the suit of *Benjamin vs. New Orleans,* reported in the 153 U. S., pages 429, 432, and by the U. S. Circuit Court, reported in 71 Federal Reporter 758, and by the U. S. Circuit Court of Appeals in the 74th Fed. Rep., 418.

The defendant herein demurred to the bill upon grounds of demurrer as follows:

1. That it does not appear upon the face of the bill any averment as to who were complainant's assignor or assignors, or their citizenship, at the date this suit was brought, and that for want of such allegation the Court was without jurisdiction.

2. That the complainants had not made the necessary parties parties to the bill, inasmuch as it appears from such bill that the Parishes of Jefferson and St. Bernard, together with the City of New Orleans, were required by the statutes of the General Assembly of the State of Louisiana to provide the means for promptly paying the amounts apportioned to them for maintaining and policing in the Metropolitan Police district; and that there were made by said parishes levies for taxes for their said respective apportionments; the said parishes and defendant had a mutual and common interest herein, which the said bill affects.

3. That the said bill does not state a cause entitling complainant to the relief prayed for; and,

4. That the bill did not disclose a cause within the equity jurisdiction of the Court.

The Court overruled the first ground of defendant's demurrer, and did not pass upon the second ground. The third and fourth grounds of the demurrer, as to whether there was equity jurisdiction shown in the bill, was maintained, and complainant's bill was dismissed. From the judgment overruling the first ground of demurrer to the jurisdiction of the court, defendant appealed to this court,

which subsequently dismissed the appeal. From the judgment maintaining the third and fourth grounds of demurrer, as to whether this was a cause in equity, the complainant appealed to the United States Circuit Court of Appeals for the Fifth Circuit; whereupon that court, desiring the instruction of this Honorable Court, certified the following questions and propositions of law arising on the record, to-wit: (1) This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship? (2) Under the facts stated in the bill and under the proper construction of Act No. 35 of the laws of Louisiana, approved March 31, 1877, can the City of New Orleans, as a legal successor of the defunct Metropolitan Police Board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late Board of Metropolitan Police for the amounts due on said certificates? (3) Under the facts stated in the bill, can the complainant maintain a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana against the City of New Orleans, for the establishment of a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid *pro rata* upon their claims?

ARGUMENT.

The allegations in the bill, by which complainant attempt to give the Federal Court jurisdiction, read as follows, to-wit: "That your orator is the holder and owner of certificates issued by said Board of Metropolitan Police in payment of its indebtedness for services rendered to it by the persons therein named, and of transfers of debts due by said Police Board amounting to three thousand and thirty ($3,030.48) and 48-100 dollars, a list whereof is hereto annexed as Exhibit "A" and made a

part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration and he is now the holder and owner thereof, and your orator avers that each of said persons in whose favor said claims accrued and to whom certificates were issued, or their heirs, or legal representatives, are citizens respectively of States other than Louisiana and competent as such citizens to maintain suit in this Honorable Court against said defendants for the enforcement of said indebtedness represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, namely:" Then follows a list of the names and citizenship of the original payees of the warrants herein sued upon. There is no averment or allegation that any of the payees whose names are set forth in the bill are the assignors of complainant, and the bill fails to allege who the assignors of complainant were or where their citizenship.

Where a chose in action has passed from the original holder through the hands of third parties, averment of the diverse citizenship of the intermediate holders is necessary to maintain a suit in the Circuit Court of the United States.

In Metcalf vs. Watertown, 128 U. S. 586, plaintiff sued upon a judgment in favor of Wright, a citizen of Wisconsin, against the City of Watertown, a municipal corporation of that State. The plaintiff, Metcalf, did not acquire the judgment from Wright, but, as assignee of certain other persons who, under assignments from Wright, became severally owners of the judgment, it no way appeared in the record that plaintiff's assignors, who were not Wright, the original owner, but various parties to whom he assigned the judgment, were not citizens of the same State as the City of Watertown; it was held that the court was without jurisdiction.

The averment of the bill is "that one Lew Goldstein, as

holder of a large amount of Metropolitan Police warrants, issued to officers and members of the Metropolitan Police, and assignee of sundry creditors of said Board of Metropolitan Police, on the 21st of October, 1886, brought suit in the Twenty-sixth Judicial District Court in and for the Parish of Jefferson, Louisiana, against said City of New Orleans, said City of Kenner, and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said Board, similarly situated; * * * that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this Honorable Court, where holders of warrants and claims against said Board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, the claims *now held by your orator being among those so presented and proved.* * * * ''

It would thus appear, that since the warrants here sued upon were held by their original owners, they had passed into the hands of other parties, by whom they were presented and proved before a master appointed in the case of Lew Goldstein, referred to by the 11th paragraph of the bill; the citizenship of such holders is no where set out in the bill and since they were intervenors in the Goldstein case it is not at all clear that they were citizens of States other than Louisiana, since such appearance could be made by the citizens of Louisiana, holding claims similar to those sued upon by the complainant, Goldstein.

It is not disputed that Federal jurisdiction depends upon citizenship; a party whose citizenship is not set out in the pleading is presumed to be a citizen of the same State as the defendant.

United States National Bank vs. McNair, 56 Fed. Rep. 323.

It is further set out in the bill that "February 9, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this Honorable Court against said City of New Orleans, and others for account of the sums due by said defendants, applicable to the payment of the certificates and claims against said Police Board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin has acquired; * * * that among said claims sued upon by said Benjamin and said intervenors, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described."

It thus again appears upon the face of the bill that intervening between the original holders of the warrant sued upon, and the complainant here, they were held by Benjamin and by the intervenors in Benjamin's suit, as to the citizenship of whom the bill is silent.

The parties to whom the warrants sued upon were originally issued by the Board of the Metropolitan Police, who are now claimed to possess the requisite citizenship to maintain this suit in the Circuit Court from the averments of the bill had evidently assigned the same to other parties before they reached the hands of the complainant; it is not sufficient to aver requisite citizenship in the original holders of these warrants to escape the statute which forbids the maintenance of a suit in the Federal Court of an assignee of a *chose in action*, upon which such a suit could not be maintained by the original holder; in point of fact, under the averments of the bill of complaint, is not the assignee of parties who were citizens of States other than Louisiana, but is the assignee of Goldstein or Benjamin or of the intervenors in their several cases, the citizenship of whom is not disclosed by the bill; it is the citizenship of these intervening assignees upon which depends

the jurisdiction in this case; the requisite citizenship of these does not appear upon the face of the bill.

Mollan vs. Torrance, 9 Wheat. 537; Turner vs. Bank of North America, 4 Dall. 8; Morgan vs. Gay, 19 Wallace, 81.

Is this a cause within the equity jurisprudence of the Court?

When the repealing act, No. 35 of 1877, was passed, the only effect it had was to abolish the Metropolitan Police Board and the Metropolitan Police and to permit the City of New Orleans to take into its own hands its police and to provide for its maintenance and to regulate same. The right to police belonged to the municipality, and it was merely as the agent of the city, the Board acted. When the Board was abolished the city resumed charge as principal. When the powers of the agent were revoked, the principal remained responsible for its acts and therefore the holders of the warrants could proceed against the City of New Orleans in an action at law just as they could have done against the Police Board had it not been abolished by Act 35 of 1877.

The bill of complainant in this suit is almost identical with the one filed by Benjamin in his suit against the city. The wording, with immaterial differences, is almost a reproduction of the Benjamin Bill, and the grounds of relief are exactly the same. Whatever could be said of the bill in the Benjamin case could equally be said here. We believe that the court, in passing on the Benjamin suit, demonstrated clearly and distinctly that it was not one of equity cognizance. But, as an evidence of how clear, English words can be tortured, so as to have their meaning interpreted in any way that suits one best, complainant has brought this suit as a cause in equity, and relies almost entirely for its support upon an isolated paragraph of the Court's opinion in the Benjamin suit. In the Benjamin case your Honors had before you as the main issue

whether or not the case was maintainable in the Circuit Court by reason of its subject matter—that is, whether or not the case stated was one which entitled complainant to relief under Section 10 of Article 1, and the 14th Amendment to the Constitution of the United States, but so interwoven was this with the other question, whether or not the suit was one of equity cognizance, that your Honors stated and discussed it at length and set forth the grounds upon which the equity jurisdiction was invoked, which were, principally, that by the repealing act of 1868 the Metropolitan Police Board no longer existed, and hence there was no defendant against whom a suit could be directed, but your Honors held, in substance, that this did not leave the complainant without remedy, as the public functions vested by the act of 1868 in the Board of Metropolitan Police, in consequence of its abolishing, fell upon the cities and parishes composing the Metropolitan Police District, and against these complainant's suit could be properly brought. But, to sustain the present bill as one in equity, complainant relies upon the following paragraph in your Honors' opinion as reported in the 153 U. S. on page 428, namely:

> "The jurisdiction in equity in this case is found in the inadequacy of the remedy at law *either* because the rights claimed could not be enforced at law, *or* because they could not be administered in that forum. The bill was manifestly framed to bring the case within that class of cases in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. Broughton vs. Pensacola, 93 U. S., 266, 268; Merriwether vs. Garrett, 102 U. S. 472, 527."

Complainant's counsel have interpreted this paragraph to mean that the Benjamin case was such a one as would come under such description, but your Honors do not leave us in any doubt as to what you meant, and we

take the liberty of quoting at length from your opinion as reported at pages 428-9, immediately following the above quoted paragraph:

"Indeed it was expressly averred that the State courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the Supreme Court of Louisiana in that behalf. Harrison vs. City of New Orleans, 40 La. Ann. 501. The contention was that the holders of these warrants had a right to bring an action at law against the Board of Police to recover thereon, and that the dissolution of the Board left the complainants without remedy except in a court of equity, judgment and execution at law not being required, because impossible, by reason of the dissolution of the Board. Therefore the court in chancery was appealed to, to lay hold of the assets of the Board as in the nature of a trust fund and apply them to the payments of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies and the taxes collected. These were the means provided by law for the payment of debts created by the Board, and if they were left unaffected by the repealing act, the alleged impairment had no basis to rest on. That act was essentially a mere change of the instrumentality of municipal government. It abolished the police organization established in 1868 and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the Board or to provide for the application of its assets to the payment of its debts, if existing laws were ample to effect that purpose. In that view the City of New Orleans remained for all purposes, so far as the creditors were concerned, the representative of the Board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the

Board. Although the creditors could not avail themselves of the instrumentality of the Board to sue for the apportionments (if that could ever have been done), still as those apportionments had all been made and taxes had been levied and in course of collection to pay them or so much thereof as was needed to pay the warrants and certificates, the act of 1877 left the City of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been."

On page 432 your Honors again emphasize what was clearly stated in the above quotation, in the following words:

"We have seen that the grounds of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the Board of Police to recover thereon, and that the dissolution of the Board left the complainants without remedy except in a court of equity, judgment and execution at law not being required, because impossible by reason of the dissolution of the Board. It is insisted that the city stands in the position of a debtor for taxes collected on Police Board apportionments and for the amounts of the apportionments themselves, so far as outstanding. If this was so and the Police Board was still in existence and liable to suit, then complainant would be obliged to recover judgment against the Board and proceed against the city by way of creditor's bill, to enforce the collection. Granting that this could be done without judgment after and because the Board had ceased to exist, nevertheless the claims of complainants must be established under the bill, precisely as they would have to be in an action at law, although it is ingeniously said that the suit is one to 'establish a fund,' this does not change the fact that it is a suit to recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is, in this instance, only another name for the

ascertainment of an indebtedness of the city to the Board, available to the creditors of the Board after their claims as such are judicially determined."

In Benjamin vs. City of New Orleans, 71 Federal Reporter, 760, the Circuit Court declared of the bill in that case, which so far as concerned the grounds it set up, to show equity jurisdiction, is identical with the bill filed in the present case:

> "The grounds of equitable cognizance relied upon in this case were, after the citation of authorities, believed by complainant's counsel to be applicable, set out in the brief of complainant's counsel, filed in the Supreme Court, as follows: The destruction of the Board of Police by the repealing act deprived the creditors of their action at law against it for their enforcement of their demands, and left them without remedy except in a court of equity which will lay hold of its property and administer it for their benefit. Judgment at law and fruitless execution are not required because impossible in the absence of existing debtor. And it has been held by this court (the Supreme Court) that by the French jurisprudence which prevails in Louisiana, a creditor may exercise the right of action of his debtor, and that the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it cannot be pursued in an action at law in the courts of the United States, and all existing rights in any State in the Union ought to be sueable in some form in those courts. City of New Orleans vs. Gaines, Admr., 131 U. S. 191-213; 9 Supreme Court, 745."

Following this the declaration of the Circuit Court, is that the Supreme Court distinctly declared the above to be the grounds of equity cognizance, and supports this declaration by quoting from the opinion of that court the language on page 428 *et seq.* in 153 U. S. Reports. This is fortified by other extracts of your Honors' opinion taken

from pages 432 and 435. After thus giving the most careful attention and consideration to the bill in the Benjamin case, as to whether or not it stated a cause in equity, the Circuit Court says, page 762:

> "The Supreme Court has clearly stated that the case was not a suit in equity arising under the Constitution of the United States. *It had clearly stated that the only grounds of equitable cognizance contended for were untenable.*"

The Circuit Court, in maintaining the city's demurrer in the present case, has said:

> "I have again carefully considered the opinion of the Supreme Court in New Orleans vs. Benjamin, 153 U. S. 411, and I am fully confirmed in my conviction that the Supreme Court has decided that that suit was not one of equity cognizance. It is perfectly plain to me that the complainant can bring a suit at law against the City of New Orleans, and that the abolition of the Police Board and the act of 1877 left the City of New Orleans to respond, as before, to the creditors * * * and the remedies to which they could resort were quite as efficient as they ever had been." "See specially page 429 of New Orleans vs. Benjamin in 153 U. S."

The only attempt complainants make to show a distinction in the bill in this case from the bill in the Benjamin suit, and as a further ground of equitable jurisdiction is in the averment that the defendant, as trustee, has collected large sums of money derived from taxes levied for the purpose of paying its indebtedness to the Board of Police which it has failed to pay over, but in violation of its duty as such trustee still holds, and which it ought to be required to account for.

Complainant will contend that this averment brings them within the decision rendered by this court in the suit of Fisher vs. City of New Orleans.

The claim involved in the Fisher case was for moneys actually collected. In this cause complainant is suing not only for an accounting for taxes collected by the city on levies for police purposes, but also prays that the city be condemned to pay, with interest, the uncollected levies and assessments of such taxes which had been apportioned to the city. Judgments at law were first obtained against the city in the Fisher case. In the present case no attempt has been made to do so. With this clear distinction between the two cases it is at once apparent that complainant does not present the same cause in equity as that set forth in the case of Fisher vs. City of New Orleans. 180 U. S. 185.

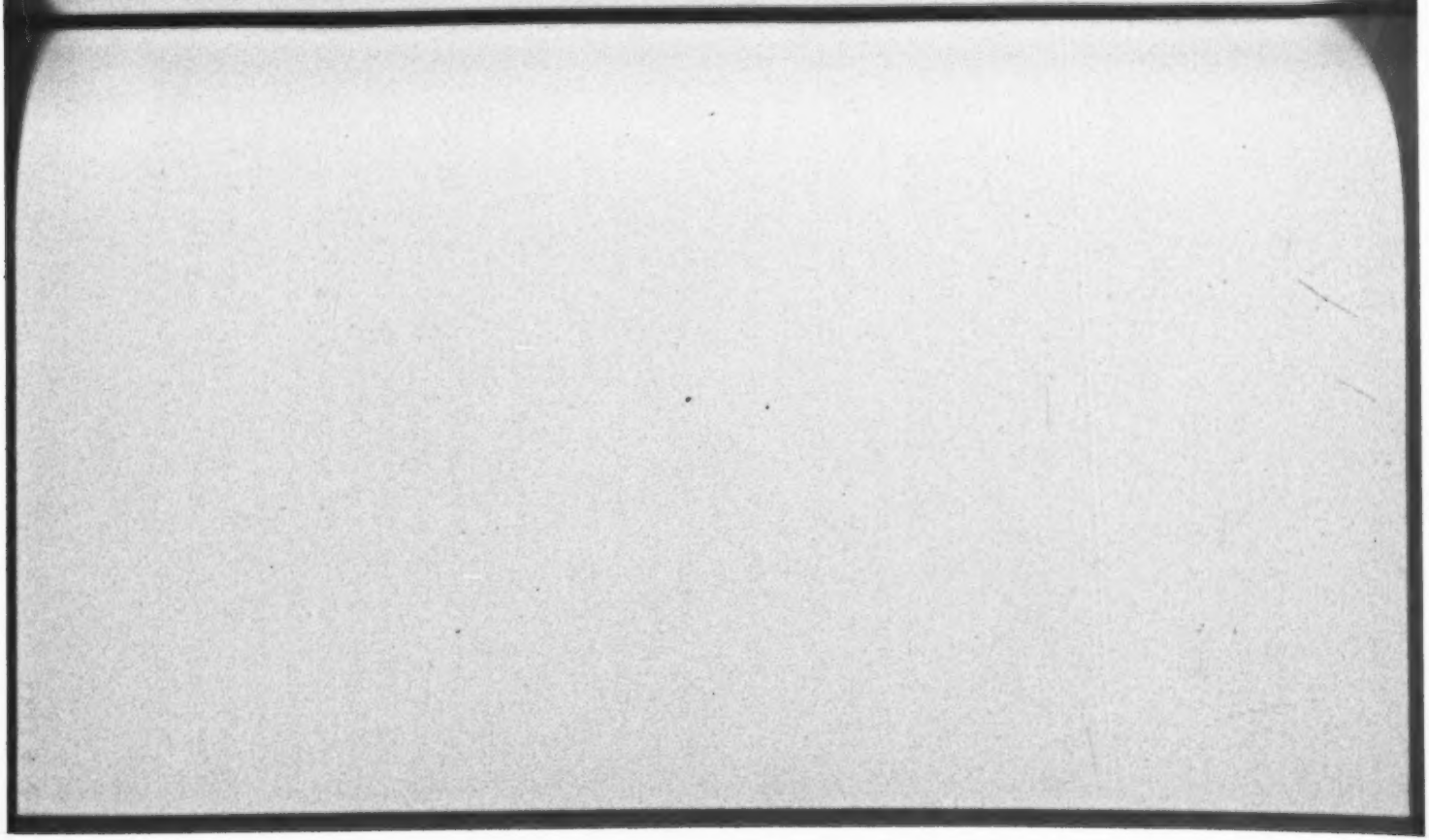
The warrants sued upon are mere orders for the payment of money drawn by one official of the Police Board upon another; they are drawn by the auditing officer upon the disbursing officer, and amount to nothing more than vouchers upon which the Treasurer may pay and by which a check may be put upon his doings, in this they do not represent obligations of the Board, but are simply directions for the payment of money for account of the Board. It is the settled jurisprudence of Louisiana that no action of any kind can be maintained upon such a warrant or certificate, or indebtedness, or other evidence of debt; they are not indebtedness, but mere vouchers upon which the Treasurer is authorized to pay an indebtedness. Flagg vs. Parish of St. Charles, 48 Ann. 766; Edwards vs. Parish of Bossier, 24 Ann. 457; Sterling vs. Parish of West Feliciana, 26 Ann. 59; and Flagg vs. Parish of St. Charles, 27 Ann. 319.

Respectfully submitted,

FRANK B. THOMAS,

SAMUEL L. GILMORE,

Solicitors for Defendant.



Supreme Court of the United States.

No. 347.—October Term, 1901.

Alphonse Emsheimer, Appellant, vs. The City of New Orleans. } On a certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

[May 19, 1902.]

The certificate in this case is as follows:

"This suit was commenced by filing in the Circuit Court the following bill and exhibit, filed November 13th, 1899:

"To the honorable the judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, New Orleans division:

"Alphonse Emsheimer, of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against the city of New Orleans, a municipal corporation created by the laws of Louisiana, and a citizen of said State. And thereupon your orator complains and says:

"1st. That by an act of the legislature of Louisiana (No. 74), approved September 14th, 1868, the parishes of Orleans, Jefferson and St. Bernard were territorially united in one district for the purpose of police government therein, called the 'Metropolitan police district of New Orleans, State of Louisiana;' that the government of said district for police purposes was vested in a board of commissioners, styled 'the board of Metropolitan police.'

"2nd. That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries (which were prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make annually an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay, and to provide the means for promptly paying, the amounts thus apportioned to them.

"3rd. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police and apportioned the same to said several cities and parishes as required by said acts.

"4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of $6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of Metropolitan police for the amount thereof.

"5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards by acts of said legislature, said cities were consolidated with said city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

"Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

"6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

"7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority levied and collected taxes for the purpose of paying the same, and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand, one hundred and six and $\frac{54}{100}$ dollars ($241,106.54,) and the defendant, the present city of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

"8th. And your orator avers that said city of New Orleans was and is a statutory trustee of the money derived from such taxation, and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been, and still is making collections thereof, and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans with the consent of said city, to whom said city on July 25th, 1888, paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars ($30,944.94) part and parcel of the moneys derived from the collection of such taxes as well as other small sums thereafter, the amount and date of payment of which is to your orator unknown.

"And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then, and is now without any successor or representative, and its affairs are under no administration whatsoever; that said city of New Orleans has since the

death of said receiver continued to collect said police taxes, and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments; and that she holds the same subject to said trust as above averred.

"And your orator avers that large amounts of said police taxes levied, as aforesaid, became delinquent, and thereafter interest accrued thereon at the rate of ten per cent per annum; that said city of New Orleans collected large amounts of such interest, which as accessory to said taxes should have been paid to said police board, but which she neglected and refused in violation of her duty as trustee, to apply to the payment of said apportionments, and she should be required to account for the same with interest thereon; that the amount of police taxes as well as the interest thereon, so as aforesaid collected, is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court, or otherwise, as your honors may direct.

"9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and maintained the same until March 31st, 1877, when said act No. 74 of September 14th, 1868, establishing said Metropolitan police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished without any provision being made for the liquidation of its affairs, or the payment of its debts.

"10th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law, ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complaint herein, and he is remediless, except in this honorable court, where matters of this nature are cognizable and relievable, wherefore he brings this his bill in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expense of this suit.

"11th. That one Lew Goldstein, as holder of a large amount of Metropolitan police warrants, issued to officers and members of the Metropolitan police, and assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said city of New Orleans, said city of Kenner and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver and enforcement of the liabilities of said several defendants, for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, the claims now held by your orator being among those so presented and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof; but as to all other defendants the same still remains pending and undisposed of.

"That afterwards, to wit: February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said city of New Orleans and others for an account of the sums due by said defendants, applicable to the payment of the certificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin had acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said interveners, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpœna in said case was duly served upon said city of New Orleans February 9th, 1891, that she afterwards appeared and answered and a final decree was made against her in favor of said complainant, and the interveners therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

"12th. That your orator is the holder and owner of certificates issued by said board of Metropolitan police in acknowledgment of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said police board, amounting to three thousand, thirty and forty-eight/100 dollars ($3,030.48), a list whereof is hereto annexed as Exhibit 'A,' and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

"And your orator avers that each of said persons in whose favor said claims accrued, and to whom said certificates were issued, or their heirs or legal representatives, are citizens respectively of States other than Louisiana, and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness, represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, viz:

"Said D. M. Moore is a citizen of the State of New York.
" Eli Jones is a citizen of the State of Texas.
" Peter Joseph is a citizen of the State of Colorado.
" Robert Crofton is a citizen of the State of Mississippi.
" W. C. Bodechtel is a citizen of the State of California.
" J. H. Moore is a citizen of the State of Colorado.
" Edward Masterson is a citizen of the State of Ohio.
" John Dinan is a citizen of the State of Ohio.
" F. Coleman is a citizen of the State of Ohio.
" R. H. Taylor is a citizen of the State of Illinois.
" W. H. Murphy is a citizen of the State of Michigan.

"Said G. H. Hamersley resided in and was a citizen of the State of California, until he died recently, leaving two sons, G. H. Hamersley and —— Hamersley, as his sole heirs, who are also citizens of the State of California.

"Said Dr. J. B. Cooper resided in and was also a citizen of the State of California, where he died leaving Mrs. Catherine E. Cooper, his widow in community, as sole heir under the laws of said State of which she is a citizen.

"15th. And your orator further shows and avers that there are now outstanding, due and unpaid, other warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief, that including interest thereof, the amount exceeds two hundred thousand dollars ($200,000); that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by the said city of New Orleans, and by other municipal corporations within said police district; that the amount due by said city as aforesaid, is applicable to the payment of the claims held and owned by your orator as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city, in order that the amount due by her may be ascertained and fixed and decreed to be paid, and applied to the payment of your orator's claims, and of such others as shall join herein and contribute to the expense of this suit.

"In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law to the end therefore that the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true and perfect answer make to all and singular the premises (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court, of the amount of taxes collected by the defendant on account of the assessments and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver, the amount of said taxes collected, with interest thereon, since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds, to meet the demands of the complainant and other creditors similarly situated who may come into this cause and take the benefit of these proceedings, and all expenses and costs; and that the same be applied to their payment."

[Then followed prayer for process and for general relief and signatures of counsel; also Exhibit "A," "List of certificates of indebtedness of Board of Metropolitan Police and claims against it held and owned by said complainant." These were in small amounts, some of them dated in October, November and December, 1874, some in December, 1875, and some in November and December, 1876. The original payees were D. M. Moore, Eli Jones, Peter Joseph, Robert Crofton, W. C. Bodechtel, Edward Masterson, R. H. Taylor, John Dinan, G. H. Hamersley, W. H. Murphy, F. Coleman and Dr. J. B. Cooper.

The city demurred to the bill on the ground that the Circuit Court had no jurisdiction as such for want of proper averments of diverse citizenship; that necessary parties were lacking; that plaintiff had not stated a case entitling him to the relief prayed; and that the remedy was at law and not in equity. On hearing the Circuit Court entered the following decree:]

"'This cause came on to be heard at a former day upon the demurrer to the bill, filed by defendant, and after arguments from counsel, was submitted.

'On consideration thereof for the reasons on file:

'It is ordered that the defendant's first ground of demurrer be and the same is hereby overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees and of the city of New Orleans, are fully sufficient.

'It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law.'

"The complainant below prosecuted an appeal to this court and assigns herein errors as follows:

'1st. Said Circuit Court erred in sustaining the demurrer to the complainant's bill, and in dismissing the same.

'2nd. Said court erred in holding that complainant's bill does not state a case within the jurisdiction of a court of equity.

'Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed and said cause reinstated to be proceeded with according to law.'

"And now at this term this cause came on to be heard on the transcript and was argued,—

"Whereupon, for the proper decision of the case, this court, desiring the instruction of the honorable, the Supreme Court of the United States, certifies to that court the following questions and propositions of law arising on the record, to wit: 1. This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship? 2. Under the facts stated in the bill and under the proper construction of Act No. 35 of the Laws of Louisiana, approved March 31, 1877, can the city of New Orleans, as a legal successor of the defunct Metropolitan Police Board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late board of Metropolitan police for the amounts due on said certificates? 3. Under the facts stated in the bill, can the complainant maintain a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana against the city of New Orleans for the establishment of a fund out of which he in common with other creditors of the late Metropolitan Police Board may be paid *pro rata* upon their claims?"

Mr. Chief Justice FULLER delivered the opinion of the Court:

This is a certificate under section six of the Judiciary act of March 3, 1891, (26 Stat. 826, c. 517,) and it is settled as to such certification that each question propounded must be a definite point or proposition of law clearly stated, so that it can be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact; and that the certificate cannot embrace the whole case, even where its decision turns on matter of

law only and even though it be split up in the form of questions. *Graver* v. *Faurot*, 162 U. S. 435; *McKeen* v. *Railroad Company*, 149 U. S. 249.

Rule 37 provides: "Where, under section six of the said act, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises." In this case there is no such statement, but the entire record is certified, and the questions contemplate an examination of the whole case and in large part its decision on the merits.

We cannot regard this certificate as in compliance with the rule, and are constrained to decline to answer the second and third questions, but we think we may properly answer the first question in view of the narrow limits by which it was apparently intended to be circumscribed.

The judicial power extends to controversies between citizens of different States; and between citizens of a State and citizens or subjects of foreign States; but the Judiciary act of 1789 provided that the District and Circuit Courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," 1 Stat. 78, c. 20, § 11; and the same provision of the act of March 3, 1887, as corrected by that of August 13, 1888, is in these words: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 433–4, c. 866, § 1.

To prevent abuse of the constitutional right to resort to the Federal courts, jurisdiction in respect of assignees or transferees was thereby denied except as to suits upon foreign bills of exchange; suits upon choses in action payable to bearer and made by a corporation; and suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made. *New Orleans* v. *Quinlan*, 173 U. S. 191.

The bill shows that at the time this suit was brought the Circuit Court had jurisdiction as between plaintiff and defendant, and also that the payees of these warrants might themselves then have instituted it, if there had been no assignment or transfer. We lay out of view as inapplicable the limitation on amount prescribed as to parties plaintiff by another clause with a different purpose.

But it is objected that the restriction relates to the time when the paper was assigned, and not to the time of the commencement of the suit; and that if there were intermediate assignees jurisdiction in respect of them must appear, and does not appear on the face of this bill.

We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789.

In *Chamberlain* v. *Eckert*, 2 Biss. 126, Judge Drummond held that the time of the commencement of the suit determined the question; and, among other things, said: "But if the rule contended for by the defendant is the true rule, then no change in the status of the payee, after the assignment, could ever enable a party to bring a suit, and it might happen, where the note was executed by the maker to the payee of another State, and at the time of the commencement of the suit in the Federal court, he was of the same State with the maker, the suit could be maintained by the assignee, a citizen of another State, because you have to look according to the view of the defense, to the status of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same State. That would be the necessary consequence, and the question recurs, what does the language of the statute mean, 'unless the suit might have been prosecuted in said court, if no assignment had been made?' I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee being a citizen of another State, can maintain the suit." And see *Thaxter* v. *Hatch*, 6 McLean, 68.

In *White* v. *Leahy*, 3 Dillon, 378, the same conclusion was announced by Judge Dillon. The suit was a bill to foreclose brought in the Circuit Court for the District of Kansas by plaintiff, a citizen of Missouri, as the assignee of a note and mortgage. The maker and payee of the note were citizens of Kansas, and were such at the time the note and mortgage were made and the payee endorsed the note and assigned the mortgage, and delivered the same to plaintiff in Missouri. But at the time the suit was brought the payee was a citizen of Texas. Judge Dillon said: "If no assignment of this note had been made, the assignor might, being at the time when suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignee does not exist at the time suit is commenced, the court has jurisdiction if the case involves the requisite amount and is between a citizen of a State where the suit is brought and a citizen of another State."

The same ruling was made by the Circuit Court of Appeals for the Fifth Circuit in *Jones* v. *Shapera*, 57 Fed. Rep. 457, and the foregoing and other cases were cited. See also *Portage Water Company* v. *Portage*, 102 Fed. Rep. 769.

In *Milledollar* v. *Bell*, 2 Wall. Jr. 334, which was a bill to foreclose, complainant, the mortgagee, was a citizen of New York, and defendant was a citizen of New Jersey, but there had been intermediate assignments. Mr. Justice Grier said: "The complainant's case is therefore within the strict letter of the law—nor can we discover anything in the spirit, equity or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, *unless his immediate assignor* could have sustained such action; but only in case the court could have had no jurisdiction as between the original parties to the instrument, *if no assignment had been made.* The situation or rights of temporary intermediate assignees, holders, or endorsers enters not into the conditions of the case."

Wilson v. *Fisher*, Bald. 133, was approved. There a citizen of New York had obtained a judgment against a citizen of Pennsylvania in the Supreme Court of that State. The judgment was assigned to citizens of Pennsylvania, and subsequently to complainant, who was an alien, and jurisdiction was sustained; Hopkinson, J., saying: "The suit cannot be maintained here unless it might have been prosecuted here, if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here."

In *Kirkman* v. *Hamilton*, 6 Pet. 20, where the payees of a note and the makers thereof were citizens of Tennessee, and before the note became due the payees became citizens of Alabama and endorsed it to a citizen of Alabama, the jurisdiction of the Circuit Court for the Western District of Tennessee of a suit brought by the holder of the note was upheld because the payees could have prosecuted a suit to recover the contents of the note in that court if no assignment had been made. But it is to be observed that the payees were not only citizens of Alabama when the suit was commenced, but when the note was assigned.

In *Mollan et al.* v. *Torrance*, 9 Wheat. 537, the declaration contained two counts. The first was against the defendant, Torrance, as endorser of a

promissory note made by Spencer and Dunn, payable to Sylvester Dunn, and endorsed by him to Torrance, by whom it was endorsed to Lowrie, and by him to plaintiffs. The other count was for money had and received by Torrance to plaintiffs' use. The declaration stated plaintiffs to be citizens of New York, and defendant to be a citizen of Mississippi, but was silent "respecting the citizenship or residence of Lowrie, the immediate endorsee of Torrance, through whom the plaintiffs trace their title to the money for which the suit is instituted."

The ruling in *Young* v. *Bryan*, 6 Wheat. 146, "that an endorsee who resides in a different State, may sue his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note," was affirmed, but it was pointed out that: "In this case the suit is brought against a remote endorser, and the plaintiffs, in their declaration, trace their title through an intermediate endorser, without showing that this intermediate endorser could have sustained his action against the defendant in the courts of the United States. The case of *Turner* v. *Bank of North America*, 4 Dallas 8, has decided that this count does not give the court jurisdiction. But the count for money had and received to the use of the plaintiffs being free from objection, it becomes necessary to look farther into the case." The record showed that defendant Torrance had filed a plea to the jurisdiction, in which he stated that the promises laid in the declaration were made to Lowrie, and not to plaintiffs, and that Lowrie and defendant were both citizens of the State of Mississippi. Plaintiffs demurred to this plea, the demurrer was sustained, and judgment rendered for defendant. The court overruled the plea because it averred that Lowrie and defendant were citizens of Mississippi at the time of the plea pleaded, not that they were citizens of the said State at the time the action was brought; and Chief Justice Marshall said: "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think that the judgment ought not to have been rendered on the demurrer in favor of the defendant." The judgment was reversed and the cause remanded.

That was a suit on the distinct contract between endorsee and endorser, but as plaintiff was not the immediate endorsee, and made title through Lowrie, who was, the court held that the first count should have shown the competency of the latter to invoke the jurisdiction at the time the suit was brought.

The general rule is that when a note or bill is endorsed in blank the *bona fide* holder of it may write an endorsement to himself or to another over the endorser's name, and where there are several endorsements in

blank he may fill up the first one to himself or may deduce his title through all of them. *Evans* v. *Gee*, 11 Pet. 80; 1 Daniel Neg. Inst. (4th. ed.) §§ 693, 694, 694a.

However, this bill does not trace title through any intermediate assignee, and on the contrary does so directly from the original payees. It is true that there are averments that in a proceeding by one Goldstein, still pending and undisposed of in the Circuit Court, against other parties than the city of New Orleans, these claims, "now held" by complainant, were presented and proved, the master's report thereon being referred to but not set out; and also that in a suit by one Benjamin and certain intervenors brought against the city of New Orleans in the Circuit Court, and subsequently dismissed without prejudice, these claims, "since acquired and now held and owned by" complainant, were included; and while this shows that these warrants must have passed through the hands of others than complainant, it does not appear that there was any endorsement of them other than in blank, and on the bill as framed complainant distinctly appears to be assignee of the payees. What complications may emerge hereafter in respect of the prior cases, or either of them, need not be considered.

We answer the first question by saying that on the face of the bill the Circuit Court had jurisdiction on the ground of diverse citizenship.

It will be so certified.

Mr. Justice GRAY did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.